Petition

81-843

No. ....
IN THE

Supreme Court of the United States

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October Term, 1981

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM A. COBB, JR., HOWARD C. DENNIS, JOHN L. CONNOLLY, JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL, ALEXANDER RADOS and WILLIAM SCHMIDT, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund; WILLIAM C. WAGGONER, FRANK TODD, WILLIAM C. COBB, JR., FREEMAN ROBERTS, DALE VAWTER, JOHN L. CONNOLLY, C. V. HOLDER, JOHN BEBEK, KENNETH J. BOURGUIGNON, HOWARD C. DENNIS, JAMES J. KIRST and JOHN C. MAXWELL, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM C. COBB, JR., HOWARD C. DENNIS, ALEXANDER RADOS, JOHN BEBEK, JAMES J. KIRST, JERALD B. LAIRD and C. I. T. JOHNSON, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, VERNE W. DAHNKE, WILLIAM A. FLOYD, ALEXANDER RADOS, WILLIAM SCHMIDT, HOWARD C. DENNIS, C. I. T. JOHNSON, JOHN BEBEK and ROBERT LYTLE, each in his respective capacity as Trustee of the Operating Engineers Journeymen and Apprentice Training Trust,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

(1) Whether the federal courts, in suits brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, are precluded from entertaining an affirmative defense that the contractual provisions sought to be enforced in such suits are "hot cargo" clauses which are proscribed by Section 8(e) of that Act, (29 U.S.C. § 158(e)), and which, therefore, are "unenforceable and void" as a matter of law?

(2) Whether the federal courts, in actions brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, may consider or apply both state law and related federal statutes which authorize an award of attorneys' fees to the prevailing party in a breach of contract action?

This Court in *Kaiser Steel Corp. v. Mullins*, No. 80-1345, 49 U.S.L.W. 3824 (May 4, 1981), has recently granted certiorari to consider both of the issues raised herein.

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No. ....

IN THE

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October Term, 1981

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on April 20, 1981.

Citations to Opinions Below.

The Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California, (CV 77-3701-WMB) printed in Appendix B, *infra*, were not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix C, *infra*, is reported in 642 F.2d 333. The order of the court of appeals, dated May 15, 1981, denying Respondents' petition for rehearing, is printed in Appendix D hereto, *infra*. The order of the court of appeals, dated August 5, 1981, denying Petitioner's petition for rehearing, is printed in Appendix E, *infra*.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 20, 1981, Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

The United States statutes involved are Sections 301 and 302(c)(5) of the Labor Management Relations Act, 1947, as amended, 61 Stat. 156, 157, 29 U.S.C. §§ 185(a), 186(c)(5), Section 8(e) of the Labor Management Relations Act, 1947, as amended, 73 Stat. 541, 29 U.S.C. § 158(e), Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e). The California statute involved is California Civil Code § 1717. These statutory provisions are set forth in Appendix A, *infra*.

Statement of the Case.

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit upholding an order of a district court in a breach of contract action brought by Respondents, the trustees of four jointly administered multi-employer trust funds, compelling the payment of fringe benefit contributions by Petitioner.

The jurisdiction of the district court was invoked under Section 301 of the Labor Management Relations Act, 1947, as amended (herein the LMRA), which grants jurisdiction over suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce.

Petitioner is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. Petitioner is a member of the Southern California General Contractors Association (herein the Association), a multi-employer collective bargaining group. As a member of the Association, Petitioner was bound to the Master Labor Agreement (herein

the "MLA") negotiated between International Union of Operating Engineers, Local Union No. 12 and the Association. The MLA obligated Petitioner to pay fringe benefit contributions to the trust funds for each hour worked under the MLA by Petitioner's employees.

In their suit, Respondents claimed that Petitioner was obligated, but refused, to pay fringe benefit contributions to the trust funds for hours worked by independent owner-operators dispatched by Petitioner in its capacity as a broker for such services, and for hours worked by Frank Sandoval (herein Sandoval), an independent contractor, and his helpers, to perform maintenance and repair work on Petitioner's equipment.

After a trial on the merits, the district court ruled that Petitioner was not obligated to make contributions for owner-operators dispatched by it as a broker, because such individuals or entities were independent contractors who were excluded from the scope of the MLA insofar as Petitioner's operations were concerned. The district court determined that under the terms of the MLA the general contractor to which the owner-operators were dispatched, and not Petitioner, had the obligation, if any existed, to treat the owner-operators as employees and to make contributions for them. The court of appeals upheld the district court's interpretation of the MLA in this respect.

The district court also held that Sandoval was an independent contractor, and not an employee of Petitioner. The district court ruled, however, that Petitioner breached the MLA by utilizing "non-employees" to perform maintenance and repair work on its equipment and that the trust funds, therefore, had been damaged in an amount equal to the contributions that Petitioner would have been obligated to pay if it had utilized "employees" to perform the work. In reaching this conclusion, the lower court specifically

rejected Petitioner's contention that the operative provisions of the MLA were void and unenforceable because they violated Section 8(e) of the LMRA.

The court of appeals upheld the district court's finding that Petitioner breached the MLA by assigning repair work to Sandoval. In doing so, the court refused to consider Petitioner's defense that the subcontracting provisions of the MLA were "hot cargo" clauses which are proscribed under § 8(e). In footnote 2 of its decision, the court cited its earlier decision in *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979), which held that "district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action." Although noting that Petitioner, unlike the employer in *McGray*, had invoked the NLRB's jurisdiction by filing an unfair labor practice charge, the court still refused to entertain Petitioner's § 8(e) defense, holding that "collateral relitigation of charges dismissed by the National Labor Relations Board is inconsistent with the policies expressed in *Waggoner* . . . ." 642 F.2d at 338 n. 2.

The court of appeals failed to appreciate that Petitioner was not attempting to "relitigate" anything, as it never had its day in court. The NLRB itself never ruled on the § 8(e) issue, and no hearing was held. After a brief investigation, the NLRB's General Counsel simply decided not to issue a complaint and dismissed the charge. Importantly, the investigation and dismissal resulted from an administrative determination, not an adversarial trial. Thus, the § 8(e) issue has never been adjudicated.

Petitioner prevailed on a substantial portion of Respondent's action. Nonetheless, both the district court and the court of appeals refused to follow state law, embodied in California Civil Code § 1717, which law is consonant with

Section 502(g) of the Employee Retirement Income Security Act of 1974 and Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980; accordingly, they refused to award Petitioner either all or a portion of its attorneys' fees incurred. Moreover, without any regard to Petitioner's success on several substantial issues of fact and law, the court of appeals, looking only to the strict wording of the MLA, overruled the district court and directed an award of attorneys' fees to Respondents for their partial success in the action.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals' Refusal to Entertain Petitioner's § 8(e) Defense Conflicts With Applicable Decisions of Other Circuits Regarding the Res Judicata Effect of the NLRB's Dismissal of an Unfair Labor Practice Charge.

The court of appeals improperly failed to consider Petitioner's defense that the MLA's provisions which Respondents seek to enforce are unenforceable and void because they violate Section 8(e) of the LMRA. Petitioner's unfair labor practice charges filed with the NLRB had been dismissed by the General Counsel after an administrative investigation. Yet the court of appeals held that to entertain Petitioner's § 8(e) defense would amount to "collateral litigation."

Until this case, the circuit courts had been consistent in their determinations that a refusal of the General Counsel to issue a complaint is *not* a final disposition of the merits of an unfair labor practice charge and is *not* entitled *res judicata* or collateral estoppel effect. In *Smith v. Local No. 25, Sheet Metal Workers Int'l. Ass'n.*, 500 F.2d 741 (5th Cir. 1974), the court stated:

> "Since the proceeding before the General Counsel was administrative only, neither formally adversarial nor like a trial, and since the General Counsel invokes different criteria in deciding whether to issue a complaint from those which a court would employ in adjudicating, *no res judicata or collateral estoppel effect attaches to the refusal for purposes of bringing suit in the federal courts*. [Citations.]" *Id.* at 748 n. 4 (emphasis added).

Also, in *Aircraft & Engine Maintenance, etc. v. I.E. Shilling Co., Inc.*, 340 F.2d 286 (5th Cir. 1965), *cert.*

denied, 382 U.S. 972 (1966), the Court of Appeals for the Fifth Circuit held that the NLRB's dismissal of an unfair labor practice charge constituted neither *res judicata* nor collateral estoppel to the employer's suit for damages under Section 303 of the LMRA, 29 U.S.C. § 187, stating:

> "Here, there was no adjucation by the Board. Shilling filed a charge. The general counsel declined to issue a complaint. Surely, *the mere refusal by the general counsel to issue a complaint is not res judicata and can not constitute a collateral estoppel*. The failure of the general counsel to issue a complaint is not necessarily based on the evidence or the merits of a case. [Citation.] To dismiss a damage suit on the proposition that the general counsel had refused to proceed would be to deny to the employer his day in court . . . ." *Id.* at 289 (emphasis added).

See also Clark Engineering and Construction Company v. United Brotherhood of Carpenters, 510 F.2d 1075, 1082 (6th Cir. 1975); *Pelzman v. Central Gulf Lines, Inc.*, 497 F.2d 332, 334-35 (2d Cir. 1974); *Maxwell Company v. NLRB*, 414 F.2d 477, 479 (6th Cir. 1969); *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 54-55 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944); *cf. Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1916). Hence a split among the circuits has developed because of the decision of the court of appeals in this case, with most circuits in direct opposition to the Ninth Circuit on this issue.

In *Waggoner v. R. McGray Inc., supra*, and *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *cert. granted*, No. 80-1345, 49 U.S.L.W. 3824 (May 4, 1981), two courts of appeals refused to consider § 8(e) defenses in § 301 suits, where the employers had filed *no* unfair labor practice charges with the NLRB whatsoever. This Court granted certiorari in *Mullins* to determine this very question

— whether federal courts can determine the legality and enforceability of contractual clauses under § 8(e) where the employer does not exhaust his administrative remedies before the NLRB.[1] Equally important is the issue whether federal courts may determine the legality of contractual clauses under § 8(e) where the NLRB has dismissed charges and the employer has no other recourse except to the courts.

It is the clear policy of the federal courts to refuse enforcement of agreements which are contrary to law or public policy. *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). The refusal of the court of appeals to consider Petitioner's § 8(e) defense results in the enforcement of a contractual provision that the LMRA, itself, declares to be "unenforceable and void." Petitioner, thus, has been denied due process because it has never had, nor otherwise may it have, its day in court on this issue.

The court of appeals' decision herein effectively divests the federal courts of jurisdiction in an area where Congress specifically granted them concurrent jurisdiction. Moreover, the decision conflicts with other circuit courts of appeals by giving collateral estoppel or *res judicata* effect to a mere administrative determination to take no further governmental action on the matter.

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[1]This Court also recently granted certiorari in three cases to consider the legality of restrictive subcontracting clauses under § 8(e). *Woelke & Romero Framing v. NLRB*, No. 80-1798, 50 U.S.L.W. 3245 (October 5, 1981); *Pacific Northwest Chapter of Associated Builders & Contractors, Inc. v. NLRB*, No. 80-1808, 50 U.S.L.W. 3245 (October 5, 1981); *Oregon Columbia Chapter, Associated Builders & Contractors, Inc. v. NLRB*, No. 81-91, 50 U.S.L.W. 3245 (October 5, 1981).

II.

The Decision Below Regarding Attorneys' Fees Conflicts With Applicable State Law, Related Federal Statutes, and Decisions of This Court.

The question of whether state law authorizing an award of attorneys' fees to the prevailing party in breach of contract actions should be applied in actions brought under Section 301 of the LMRA, and the application of ERISA's provisions to such actions, has never been determined by this Court.

The decision of the court below directly conflicts with California law, as the court of appeals specifically rejected state law in order to judicially create a uniform national attorneys' fees rule in § 301 actions. In fashioning a new national attorneys' fees rule, the court of appeals totally ignored *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), wherein this Court held that it was proper in a § 301 suit to apply the Indiana 6-year statute of limitations, rather than judicially fashioning a uniform national statute of limitations for such actions. *Id.* at 701-04. In *Hoosier Cardinal*, this Court specifically ruled that uniformity alone did not supply a reason for ignoring applicable state law in § 301 suits and engaging in drastic "judicial legislation." *Id.* at 702. This Court recently reaffirmed *Hoosier Cardinal* in *United Parcel Service v. Mitchell*, No. 80-169, 49 U.S.L.W. 4378 (April 20, 1981).

Even in determining which substantive law to apply in § 301 suits, this Court has declared that "state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate federal policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957); *see also John Wiley & Sons v. Livingston*, 376 U.S. 543, 548 (1964) ("Federal law, fashioned 'from

the policy of our national labor laws controls.' [Citation.] State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case . . . .").

Petitioner submits that the mutuality principle embodied in California Civil Code § 1717 is consonant with the explicit Congressional design behind the national labor laws. Both Section 502(g) of the Employee Retirement Income Security Act of 1974 (herein ERISA), 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the recently enacted Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e), amending ERISA, specifically provide that the court, in its discretion, *may allow* attorneys' fees and costs to the prevailing party.

ERISA authorizes suits by and against employee benefit trust funds, and is clearly applicable federal law to which the federal courts should look in deciding whether attorneys' fees should be awarded in § 301 actions concerning trust fund contributions. The court of appeals totally ignored these relevant federal statutes in rejecting the mutuality rule embodied in California statutory law.

The question of whether ERISA authorizes attorneys' fees in a § 301 suit for the prevailing party in the absence of contractual languge is currently before the Court in *Mullins v. Kaiser Steel Corp., supra*. In that case the Court of Appeals for the District of Columbia Circuit ruled that Section 502(g) of ERISA authorized attorneys' fees to the trustees of a trust fund who prevailed in a § 301 action to collect fringe benefit contributions. *Id.*, 642 F.2d at 1320. The related question raised herein—whether a defendant employer is entitled to attorneys' fees if it prevails in a § 301 suit—is of equal significance.

The instant case raises the § 8(e) affirmative defense issue and the § 301 attorneys' fee issue, *both* of which issues this Court has agreed to consider in *Mullins*. The instant case raises these significant issues in slightly different factual contexts, and, therefore, would make a proper companion case to *Mullins* in order that this Court may fully address these complex and significant questions.

The mutuality policy embodied in California Civil Code § 1717, far from frustrating the congressional design behind the national labor laws, assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith meritorious defenses to claims such as this. The allowance of attorneys' fees to the prevailing party is also certain to temper the decisions of whether to invoke federal jurisdiction for the enforcement of dubious contract claims.

This Court is aware of the fact that innumerable employers in the construction industry are unable to withstand the financial burden of protracted litigation with trust funds whose combined assets far exceed the individual contractor's assets. Also, thousands of small contractors are essentially forced to sign short form contracts to master labor agreements, as in the instant case, which contain provisions of questionable legality. These small contractors do not, in reality, participate in collective bargaining negotiations. And, in actual application, such contracts are often nothing more than adhesion contracts. The mutuality principle was designed to protect such parties.

Many contractors are forced into compromising their positions rather than challenging either the accuracy of the trust funds audits or the validity of the trust funds' claims, which claims are sometimes based upon illegal and unenforceable contract provisions. Of course, the cumulative impact of the use of economic pressure under the veil of

contract enforcement to force contractors to do, or agree to do, something that they had not agreed to in collective bargaining, or which is otherwise illegal, invariably leads to a breakdown in the faith which unions and employers alike must have in collective bargaining, which faith is so fundamental to the workings and success of the national labor laws.

The mutuality policy behind California Civil Code § 1717 should be imported into federal labor law in order to lessen the coercive impact of claims such as those brought by the Respondents herein, thereby furthering the congressional policy of enforcing *only* those duties and obligations to which the parties agreed during collective bargaining and/or are bound to as a matter of law. A contractual provision allowing attorneys' fees to only one party is unfair and contrary to public policy. Such a provision upsets the delicate balance of power in labor relations which is necessary for effective collective bargaining. In reaching its decision, however, the court below essentially jettisoned a balanced national labor relations policy by refusing to entertain a mutuality approach, sanctioned under both the state and federal statutes, in determining an entitlement to an award of attorney's fees.

It is submitted, therefore, that the court below, by declining to award attorneys' fees and costs to Petitioner for its defense of this action, at least to the extent that it has prevailed, substantially departed from this Court's *Hoosier Cardinal* rule, ignored the relevant recent expressions of Congressional intent on attorneys' fees entitlement under ERISA, and directly contradicted otherwise applicable state law.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A.

Statutory Provisions Involved.

1. Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C., Section 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Section 302(c)(5) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C., Section 186(c)(5), provides in pertinent part:

> "The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) . . . ."

3. Section 8(e) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C., Section 158(e), provides:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such

extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.''

4. Section 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1132(g), provides in pertinent part:

''(1) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 U.S.C.S. §1145] in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate."

5. Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C., Section 1451(e) provides:

"In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party."

6. Section 1717 of the California Civil Code provides:

"In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

As used in this section 'prevailing party' means the party in whose favor final judgment is rendered."

APPENDIX B.

Findings of Fact, Conclusions of Law and Order of the United States District Court, Central District of California.

United States District Court Central District of California.

William C. Waggoner, *et al.*, etc., Plaintiffs, vs. Northwest Excavating, Inc., *et al.*, Defendants. Case No. CV 77 3701 FJK.

Filed: June 28, 1978.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

PROPOSED FINDINGS OF FACT

1. This is an action by trustees to recover fringe benefit contributions allegedly due from defendant under the terms of a Collective Bargaining Agreement between Local Union No. 12, International Union of Operating Engineers, AFL-CIO, and certain employer associations. The employee trust funds were established pursuant to 29 U.S.C. 186(c).

2. The court has jurisdiction of this action under 29 U.S.C. 185 (a) of the Labor Management Relations Act. Since the action is based upon an alleged Collective Bargaining Agreement between defendant and the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, a labor organization which represents employees in an industry affecting commerce pursuant to 29 U.S.C. 152 (5). The claims arise out of defendant's alleged failure to pay certain fringe benefit contributions to the plaintiffs in accordance with the provisions of the Collective Bargaining Agreement.

3. Plaintiffs are the trustees of the Operating Engineers Health and Welfare Fund, Pension Trust, Vacation-Holiday Savings Trust, and the Journeymen and Apprentice Training

Trust, all established by the representatives of Local Union No. 12 and representatives of various multi-employer associations in Southern California and Southern Nevada. The trusts are express trusts created pursuant to 29 U.S.C. 186(c)(5) to receive payments from employers on behalf of employees under the Collective Bargaining Agreement.

4. Defendant Northwest Excavating, Inc., and its predecessor Northwest Compaction Co., Inc., are and were California corporations organized and existing under the laws of the State of California. Northwest Excavating, Inc., is the successor in interest to Northwest Compaction Co., Inc. Northwest is engaged in the business of renting construction equipment with an operator to building contractors. Northwest is also engaged as a broker in referring independent contractors to construction contractors.

5. Northwest is bound to a Collective Bargaining Agreement with the Union by virtue of membership in the Southern California Contractors Association, an employer group which represents employer-members for purposes of collective bargaining. Defendant is obligated by the agreement to pay to the trustees of the trusts a specified rate of contribution per hour on behalf of employees who perform work covered under the agreement.

6. Pursuant to the agreement, defendant submitted monthly written report forms to the trustees on which forms defendant listed the names of and hours worked by employees of defendant during said months as employees covered under the Collective Bargaining Agreement. Defendant accurately reported and paid all contributions due and as shown to be due by the monthly report forms.

7. From November, 1975, defendant has engaged Frank Sandoval doing business as Sandoval Equipment Repair to perform repair and maintenance to defendant's equipment.

8. Frank Sandoval doing business as Sandoval Equipment Repair has been engaged as an independent contractor in the business of repairing construction equipment since approximately 1971.

9. Frank Sandoval is a self-employed person and an independent contractor and is not an employee of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

10. In the courts and conduct of his business, Frank Sandoval utilizes the services of other equipment repair personnel. These persons are not employees of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

11. Frank Sandoval and those who work with him are not subject to control by defendant. It is not within the power of defendant to exercise control over Frank Sandoval and/or those who work with him.

12. The following are independent contractors and are not employees of Northwest, within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel
l. W. G. Burns

m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

13. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid on hours worked by Frank Sandoval and those individuals who work with him.

14. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by any owner-operator utilized by Northwest in its capacity as a broker.

15. The independent owner-operators referred by Northwest to construction contractors are not employees of Northwest. The independent owner-operators are independent contractors within the meaning of the Act, the Collective Bargaining Agreement and the trust agreements.

16. The owner-operators utilized by Northwest in its capacity as a broker are not those as to whom Northwest owed any obligation to the plaintiffs, for any reason, contractual or otherwise, to make deductions and remit contributions to the trusts.

17. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., and 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

18. The subcontracting clauses, including Paragraph 22, Page 13 in the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June

15, 1980 (Plaintiff's Exhibit "2") are lawful and enforceable and not in violation of 29 U.S.C. 158(e).

19. The plaintiffs are not entitled to liquidated damages from defendant.

20. Plaintiffs are not entitled to an award of attorney's fees against defendant.

21. Defendant is not entitled to an award of attorney's fees against plaintiffs.

22. Plaintiffs are not entitled to an award of costs, or other costs of suit, against defendant.

23. Defendant is not entitled to an award of costs, or other costs of suit, against plaintiffs.

24. The plaintiffs caused to be published and disseminated to the signatories to the Collective Bargaining Agreement instructions that no employer shall pay trust fund contributions on behalf of any owners, owner-operators, partners, self-employed persons or any person other than a bona-fide operating engineer.

25. Defendant did not refuse to produce or make available to plaintiffs the relevant payroll records requested by plaintiffs.

26. Defendant has not failed to pay fringe benefit contributions as required by the valid and enforceable provisions of the Collective Bargaining Agreement. There is not due and owing to plaintiffs any interest upon such alleged unpaid fringe benefit contributions since no such unpaid fringe benefit contributions exist.

27. Plaintiffs are not entitled to liquidated damages since no trust fund contributions are owed to plaintiffs by defendant. Plaintiffs are not entitled to expenses incurred in any audits of defendant's records.

28. That defendant in proceeding as it did as to utilizing the services of Sandoval and the individuals who work with

him breached defendant's contractual obligations under Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980.

29. The damages flowing from defendant's breach is measured by the amount of contributions that would have been due and paid by defendant if Sandoval and the individuals who work with him were employees of defendant within the provisions of the Collective Bargaining Agreement.

PROPOSED CONCLUSIONS OF LAW

1. Northwest is bound to the Collective Bargaining Agreement with Local 12 by virtue of its membership in the Southern California Contractors Association.

2. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

3. Frank Sandoval and those individuals who work with him are not employees of Northwest within the meaning of 29 U.S.C. 152 (3), 29 U.S.C. 186 (c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by Frank Sandoval and those individuals who work with him.

No employee trust fund contributions can be compelled to be made by Northwest on behalf of Frank Sandoval and those who work with him, to plaintiffs.

4. Owner-operators utilized by Northwest in its capacity as a broker are independent contractors and not employees of Northwest within the meaning of 29 U.S.C. 152 (3), 29 U.S.C. 186 (c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on owner-operators utilized by Northwest in its capacity as a broker. No employee trust fund contributions can be compelled to be made by Northwest on behalf of owner-operators utilized by Northwest in its capacity as a broker.

5. The following are independent contractors and are not employees of Northwest within the meaning of the Act, the Collective Bargaining Agreement, and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel
l. W. G. Burns
m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

The Collective Bargaining Agreement does not provide that Northwest pay benefits or contributions on these independent contractors to the plaintiffs. No employee trust fund contributions can be compelled to be made by Northwest on behalf of said independent contractors.

6. Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 and Article I, Paragraph B, Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980, are lawful and enforceable and not proscribed by 29 U.S.C. 158 (e).

That Northwest breached its contractual obligations to plaintiffs under said Paragraphs of the Collective Bargaining Agreements by utilizing Frank Sandoval and those who work with him to maintain and repair its equipment.

The damages to plaintiffs occasioned by said breach is measured by the amounts of contributions that would have been due and paid by defendant to plaintiffs if Sandoval and those who work with him were employees of Northwest within the provisions of the Collective Bargaining Agreement. Said damages are in the sum of $18,993.53.

Let judgment be entered accordingly.

JUN 28, 1978

/s/ Robert J. Kelleher
ROBERT J. KELLEHER,
United States District Judge

United States District Court Central District of California.

William C. Waggoner, et al., etc., Plaintiffs, v. Northwest Excavating, Inc., etc., Defendant. No. CV 77-3701-RJK.

Filed: June 28, 1978.

JUDGMENT.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment in favor of plaintiffs and against defendant be, and the same hereby is, granted, and that plaintiffs, each in his capacity as Trustee of each respective trust, shall recover damages in the amount of $18,993.53 resulting from the breach by defendant Northwest Excavating, Inc. of certain paragraphs of the Collective Bargaining Agreement.

DATED: June 28th, 1978.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge.

APPENDIX C.

Opinion of the Court of Appeals for the Ninth Circuit.

William C. WAGGONER et al, etc, Plaintiffs-Appellees and Cross-Appellants, v. NORTHWEST EXCAVATING, INC., etc. Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 18, 1980. Decided April 20, 1981. Rehearing Denied May 15, 1981.

Trustees of union trust funds brought action to recover employee fringe benefit contributions from construction equipment rental company. The United States District Court for the Central District of California, Robert J. Kelleher, J., held in favor of the trustees in part and the company in part, and both parties appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) owner-operators dispatched by the construction equipment rental company to do construction work when its own equipment and personnel were unavailable were independent contractors and not the employees of the construction equipment rental company and, therefore, the company did not have to make employee fringe benefits contributions to the union trust funds for the hours worked by such owner-operators; (2) businessman who was hired to perform the repair and maintenance work on the equipment of the construction equipment rental company was an independent contractor, but the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement which obligated it to employ its own employees for repair work and, therefore, the company had to make employee fringe benefit contribution to the union trust fund in an amount equal to what was lost by virtue of its employment of such independent contractor; (3) construction equipment

rental company was not entitled to an award of attorney fees and costs based on California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs; and (4) trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the delinquency in making employee fringe benefit contributions that resulted when the construction equipment rental company wrongfully hired independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquencies in the payment of such contributions.

Affirmed in part and reversed and remanded in part.

1. Labor Relations 131.6

Since construction equipment rental company, which would dispatch owner-operators to do construction work when its own equipment and personnel were unavailable, could exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operator by negotiating the initial rates for the equipment and the operator, such owner-operators were independent contractors and not employees of construction equipment rental company and, therefore, the construction equipment rental company did not have to make employee fringe benefit contributions to union trust funds for the hours worked by the owner-operators. Labor Management Relations Act, 1947, §§ 801, 802(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

2. Federal Courts 776

Construction of contractual provision is a question of law subject to de novo review by the Court of Appeals.

3. Labor Relations 131.6

In provision of master labor contract between multi-employer association and union stating that "the owner-operator shall become a bona fide employee of the Contractor . . . upon reporting for work on the second consecutive day," the term "Contractor" referred to the general contractor and required the general contractor to treat owner-operators as employees and to make employee fringe benefit contributions to union trust funds for the hours worked by such owner-operators. Labor Management Relations Act, 1947, §§ 301, 302(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

4. Labor Relations 131.6

Although construction equipment rental company leased its fully equipped repair facilities to businessman who performed the repair and maintenance work on its equipment, there was no evidence that the construction equipment rental company had control over the businessman and, therefore, the businessman was an independent contractor; however, the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement, which obligated it to employ its own employees for repair work, and, therefore, company had to make employee fringe benefit contributions to the union trust funds in an amount equal to what was lost by virtue of its employment of such independent contractor.

5. Contracts 10(1)

California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs was not applicable to action by trustees of union trust funds against construction equipment rental company to recover employee fringe benefit contributions and, therefore, although the company prevailed on several issues, it was not entitled to an award of attorney fees and costs based on such statute.

Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, § 8(e) as amended 29 U.S.C.A. § 158(e).

6. Labor Relations 131.6

Trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the company's delinquency in making employee fringe benefit contributions that resulted when it wrongfully hired an independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquency in the payment of such contributions. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Wayne Jett, Los Angeles, Cal., for Waggoner.

James G. Johnson, Hill, Farrer & Burrill, Los Angeles, Cal., on brief; Stanley E. Tobin, Los Angeles, Cal., argued, for defendant-appellant and cross-appellee.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and NELSON, Circuit Judges, and TURRENTINE,* District Judge.

PREGERSON, Circuit Judge:

This action was brought by the Trustees of four union trust funds to recover employee fringe benefit contributions from Northwest Excavating, Inc. The Trustees contend that Northwest should have made payments to the trust funds based on the hours worked by one Frank Sandoval and his

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

helpers, and by several owner-operators of construction equipment. After a two-day trial, the district court held Northwest liable solely for contributions for the hours worked by Sandoval and his helpers. The district court declined to award attorney's fees and costs to either party. Both sides appeal.

I. *Facts*

Northwest Excavating, Inc. is a member of the Southern California General Contractors Association, a multi-employer group that bargains collectively on behalf of its members with Local 12 of the International Union of Operating Engineers. As a member of the Association, Northwest signed the Master Labor Agreement (MLA) negotiated between Local 12 and the Association for the years 1974-1977 and 1977-1980. Among other things, the MLA obligates Northwest to pay to the employee benefit trust funds a certain contribution for each hour worked under the MLA by Northwest's employees.

Northwest is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. After receiving a request from a contractor for equipment and operating personnel, Northwest will dispatch its own equipment and personnel, if available. If either or both are unavailable, Northwest then will dispatch independent owner-operators to do the work. The fees earned by the independent owner-operator are paid by the general contractor to Northwest who then tenders the fee to the owner-operator, less a seven percent brokerage commission.

Before November 1975, Northwest employed several people to repair and maintain its own equipment. In November 1975, however, Northwest hired Frank Sandoval and his helpers to perform the repair and maintenance work.

Since 1971, Sandoval has been doing business as Sandoval Equipment Repair.

In 1977 the Trustees of Local 12's employee benefit trust funds informed Northwest that it owed contributions for hours worked by Sandoval, his helpers, and the independent owner-operators Northwest dispatched when its own operators and equipment were unavailable. Northwest refused to contribute, arguing that Sandoval, his helpers, and the owner-operators were independent contractors, not employees, within the meaning of MLA. The Trustees filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover the disputed payments. After a two-day trial, the Honorable Robert J. Kelleher concluded that although Sandoval, his helpers, and the owner-operators are independent contractors, Northwest breached the MLA by employing Sandoval instead of Northwest's own employees to perform the repair work. The court ordered Northwest to tender to the Trustees an amount equal to what the funds lost by virtue of Sandoval's employment. That amount was stipulated to be $18,993.53.

II. *Trustee's Appeal*

The district court found that owner-operators dispatched by Northwest to general contractors were not Northwest's employees but rather were independent contractors. The parties agree that independent contractors, as such, are excluded from the scope of the MLA by virtue of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), authorizing employer contributions to trust funds solely on behalf of employees. The district court also found that although the MLA requires the "Contractor" to put owner-operators on its payroll as of the second day of work, the term "Contractor" refers to general contractors, not to

Northwest acting as a broker. The Trustees argue that these two findings are clearly erroneous.

In distinguishing an employee from an independent contractor, courts apply common law principles of agency to the factual context of each case. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968).[1] In addressing the issue, this court considers certain factors set forth in the Restatement (Second) of Agency § 220(2):

(a) The extent of control which, by the agreement, the master can exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular operation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

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[1] *NLRB v. United Insurance Co. of America* applied common law agency principles to the term "employee" found in section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). The trust funds are established on behalf of "employees" pursuant to section 302(c)(5) of the Labor Management Relations Act. 29 U.S.C. § 186(c)(5). Section 501 of the Labor Management Relations Act, 29 U.S.C. § 142, provides that when used in that Act, the term "employee" shall have the same meaning as when used in the National Labor Relations Act. Therefore the cases interpreting the term "employee" under the National Labor Relations Act are applicable to the analysis here.

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Brown v. NLRB, 462 F.2d 699, 705 n. 10 (9th Cir.), *cert, denied*, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972). Specifically, this court has stated that the common law agency test rests primarily on the "amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work." *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383, 1385 (9th Cir. 1969); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975). This factor, however, must be tempered by other considerations relevant to the relationship in its entirety. *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 973 (9th Cir. 1978) ("Other factors which this court has considered are the entrepreneurial aspects of the individual's business; risk of loss and opportunity for profit; and the individual's proprietary interest in his business.").

[1] The district court correctly concluded that the owner-operators were independent contractors and not employees of Northwest. Each owner-operator dispatched by Northwest was not required to accept the offered construction work. Each was also free to render similar services to other contractors. Each owner-operator set his equipment rental rate with Northwest, but was free to renegotiate the rate with the general contractor if the work proved more difficult or extensive than anticipated. Each was supervised, if at all, by the general contractor, not by Northwest, as to the hours, the extent, and the performance of his work. Northwest's only involvement in the employment relationship was to provide timecards to record the hours worked.

The timecards were returned by the owner-operators to Northwest who then billed the general contractor for the services rendered. The rate billed was an hourly rate combining the equipment usage fee with the charge for the operator's labor. The entire payment—less a seven percent brokerage commission—was remitted by Northwest to the owner-operator. Since Northwest may exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operators by negotiating the initial rate for the equipment and the operator, the district court correctly concluded that the owner-operators were independent contractors and not Northwest's employees.

Notwithstanding the district court's conclusion, the Trustees argue that the MLA required that owner-operators eventually become Northwest's employees even though they began their jobsite work as independent contractors. The relevant provisions of the MLA provide:

> The Owner-Operator shall become a bona fide employee of the Contractor as defined in the Agreement upon reporting for work on the second consecutive working day; such employee status to be effective from the first hour of work performed on the preceding working day. The term CONTRACTOR (or EMPLOYER) shall refer to a person, firm or corporation, party to this AGREEMENT.

The Trustees argue that "Contractor" refers to Northwest as a signatory of the MLA and requires Northwest to place owner-operators on its payroll. Northwest, on the other hand, asserts that the MLA requires the general contractors for whom owner-operators work to include them on the general contractors' payrolls. The district court found that the MLA requires that general contractors, not Northwest

acting as a broker, treat owner-operators as employees and therefore pay the appropriate trust fund contributions.

[2, 3] The construction of a contractual provision is a question of law subject to our de novo review. *Transport Indemnity Co. v. Liberty Mutual Insurance Co.*, 620 F.2d 1368, 1370 (9th Cir. 1980); *Republic Pictures v. Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858, 75 S.Ct. 83, 99 L.Ed. 676 (1954). After reviewing the record, we find the district court's interpretation of the MLA to be reasonable and correct.

III. *Northwest's Appeal*

[4] The district court found that Frank Sandoval was also an independent contractor and as such could not be considered an employee of Northwest. Under the Restatement guidelines set forth above, this conclusion is correct. Sandoval owns his business and has other customers besides Northwest. Sandoval sets his own hours and billing rates and is not supervised by any of his customers, including Northwest, except to the extent that the customer dictates what it wants accomplished. Although Northwest does lease its fully-equipped facilities to Sandoval, who drives a truck insured and owned by Northwest, there is no evidence that Northwest controls or has the power to control Sandoval who ran his own heavy duty repair business for over four years before acquiring Northwest as a customer. Accordingly we affirm the district court's finding that Sandoval was an independent contractor.

We also affirm the district court's finding that, under the MLA, Northwest was obligated to employ its own employees for repair work and that therefore it breached the MLA by employing Sandoval. The MLA provides in pertinent part:

> Nothing in this Agreement shall limit the right of Contractors to utilize machinery and equipment dealers to perform major repairs on machinery and equipment on or off the jobsite. All other maintenance and repairs which are normally and customarily performed by persons in the classification of Heavy Duty Repairman/ Welder shall be performed by employees covered by this Agreement. . . .

At trial it was established that Sandoval does routine repair work previously done by his predecessor, Hutchison, a heavy duty repairman who was a union employee of Northwest. Initially, Hutchison worked for Northwest without joining the union. His non-union employment was the subject of grievance proceedings. As a result of the proceedings, Northwest began contributing to the trust funds on Hutchison's behalf. The record reflects that Sandoval characterizes his occupation as "heavy duty repairman/welder" and uses the tools of a working mechanic in that classification. Thus the district court properly found that Northwest breached the MLA by assigning routine repair work to Sandoval.[2]

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[2]Northwest asserts that the district court should have refused to enforce the MLA on the theory that the MLA embodied an unfair labor practice forbidden by section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). We have previously held that "district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action." *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979). *See also Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, 639 F.2d 487, 491 (9th Cir. 1980). Northwest attempts to distinguish *Waggoner* on the ground that, unlike the employer in *Waggoner*, Northwest filed unfair labor practice charges with the NLRB which were later dismissed. Northwest's distinction is unpersuasive. Collateral relitigation of charges dismissed by the NLRB is inconsistent with the policies expressed in *Waggoner;* accordingly, we decline to entertain Northwest's section 8(e) defense.

IV. *Costs, Attorney's Fees, and Liquidated Damages*

[5] The district court declined to grant attorney's fees, costs, or liquidated damages to either party. Northwest argues that it should have been awarded fees under Cal.Civ. Code § 1717 which states:

> In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), prohibits a federal court from awarding attorney's fees under state statutes allowing such fees unless the court's jurisdiction is based upon diversity of citizenship. Therefore section 1717 is inapplicable to the instant case. Northwest argues that section 1717 applies here by quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957), to the effect that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." Northwest argues that the mutuality requirement embodied in Cal.Civ.Code § 1717 assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith, meritorious defenses to section 301 claims, and that section 1717 is certain to temper the invocation of federal jurisdiction for the enforcement of questionable contract claims.

We read *Alyeska*, however, as imposing strict limits on the use of state law to support attorney's fees awards. Those limits were not overborne by the federal environmental pol-

icies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the policies asserted by Northwest in this case. In fact, federal labor policy supports the district court's decision to decline to award fees under section 1717. "Courts must always evaluate litigation under 301(a) with an eye to the policy of uniformity which that statute embodies." *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979). Uniformity would be defeated, with few, if any, countervailing benefits, by applying fifty different state laws on the issue of attorney's fees. Of course, this example is distinguishable from the situation where the parties provide for attorney's fees in their collective bargaining agreement. There, the federal labor policy of enforcing the parties' intent as expressed in their negotiated agreement is paramount. *Cf. Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1236 (9th Cir. 1979) ("Courts and arbitrators are permitted to resolve disputes governed by the terms of collective bargaining agreements despite potential conflicts with the NLRB . . . because of the national labor policy favoring resolution of disputes through mechanisms established by the parties to the disputes."). The district court's denial of attorney's fees and costs to Northwest is affirmed.

[6] On the other hand, the district court's denial of attorney's fees, costs, and liquidated damages to the Trustees is reversed. Unlike Northwest, who based its claim for fees on state law, the Trustees base their claim on the following provision of the MLA:

> All signatory Employers found to be delinquent shall pay for all legal and auditing costs in connection with such delinquency, plus liquidated damages in the amount of twenty-five dollars ($25.00) or ten percent (10%) of the total sums of the contributions, whichever

> is greater to the Operating Engineers Health and Welfare Fund.

The district court found that this provision of the MLA applies only when an employer fails to contribute to the trust funds on behalf of its employees and not when the employer fails to contribute on behalf of wrongfully hired independent contractors and their employees who displace union members.

We agree with the Trustees that the district court read the MLA too narrowly. On remand, the district court should determine the amount of attorney's fees, costs, and liquidated damages to be awarded to the Trustees by virtue of the delinquency that resulted when Northwest wrongfully hired Sandoval and his helpers to perform protected union work.

AFFIRMED in part and REVERSED AND REMANDED in part; parties to bear their own costs on appeal.

APPENDIX D.

Order of the Court of Appeals for the Ninth Circuit, Denying Respondent's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiffs-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., etc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: May 15, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The petition for rehearing is denied.

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E.

Order of the Court of Appeals for the Ninth Circuit, Denying Petitioner's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiff-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: August 5, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc and Judge Turrentine has recommended such rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Opposition

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No. 81-843

IN THE

Supreme Court of the United States

October Term, 1981

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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Questions Presented.

(1) Whether the merits of a Section 8(e) unfair labor practice issue may be raised as a defense in a Section 301 suit for enforcement of fringe benefit payments when the NLRB General Counsel has finally dismissed the employers' charges based on the same allegations?

(2) Whether the court of appeals properly declined to apply state law or fashion a federal rule permitting an award of attorneys' fees to the employer in this Section 301 suit when the collective bargaining agreement authorizes recovery of attorneys' fees by the fringe benefit trustees only?

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IN THE

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NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

BRIEF IN OPPOSITION.

Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 20, 1981, be denied.

STATUTES INVOLVED.

This case involves Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a), and Section 8(e) of the National Labor Relations Act, 73 Stat. 543, 29 U.S.C. § 158(e), and California Civil Code Section 1717.

Contrary to the petition, this case and the petition do not present issues involving Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 157, 29 U.S.C. § 186(c)(5), or Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 891, 94 Stat. 1295, 29 U.S.C. § 1132(g), or Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e).

STATEMENT OF THE CASE.

Affirming the district court, the Court of Appeals concluded that petitioner Northwest Excavating, Inc. ("Northwest") breached the terms of the Master Labor Agreement ("MLA") by subcontracting routine repair work to Frank Sandoval when the MLA expressly required that such work be performed by Northwest's employees covered by the MLA. (*Pet. App.*, pp. 22-23.) In the pretrial conference order, Northwest asserted an affirmative defense that the restrictions on subcontracting in the MLA are unlawful under Section 8(e) of the National Labor Relations Act (the "Act"). During the trial, Northwest argued its theory of the alleged violation of Section 8(e), but did not introduce evidence or make an offer of proof of facts sufficient to establish a violation of Section 8(e).

On September 21, 1979, Northwest presented the same alleged violation of Section 8(e) in an unfair labor practice charge against respondents ("Trustees") and Local 12 filed with the NLRB in Case No. 31-CE-136. On October 29, 1979, the Regional Director of the NLRB dismissed Northwest's charge based on the conclusion that the challenged clause in the MLA is a lawful, primary provision. On March 7, 1980, Northwest's appeal to the General Counsel of the NLRB was denied for substantially the same reasons set forth by the Regional Director. On July 29, 1980, Northwest filed a second, similar charge in Case No. 31-CE-157 against Local 12 and the Trustees. This charge was dismissed and a subsequent appeal denied by the NLRB General Counsel on substantially the same grounds.

The judgment of the district court was entered on June 29, 1978. The provisions of Section 502(g) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. § 1132(g)] and Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980 ("Multiem-

ployer Act'') [29 U.S.C. §1451(e)] quoted in the petition (*Pet. App.*, pp. 2-3) were enacted on September 26, 1980. Northwest's principal brief in the court of appeals was filed on April 18, 1979, long before enactment of these statutes. Northwest did not attempt to raise the newly enacted statutes in its petition for rehearing and suggestion for rehearing *en banc* filed in the court of appeals on May 7, 1981.

REASONS FOR DENYING THE WRIT.

I.

The Questions Presented by This Case Are Distinguishable From the Issues in *Kaiser Steel Corporation v. Julius Mullins*.

In this case, Northwest has filed two Section 8(e) charges with the NLRB, and each charge has been finally dismissed for lack of merit. In *Kaiser Steel Corporation v. Julius Mullins, et al.*, No. 80-1345, the employer never filed charges with the NLRB.

In this case, the court of appeals adhered to the principles of *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975) and declined to apply state law or fashion a federal rule to serve as a basis for awarding attorneys' fees to Northwest. By contrast, the appellate court in *Kaiser Steel Corporation v. Mullins* [*sub nom. Mullins v. Kaiser Steel Corporation*, 642 F.2d 1302, 1320 (D.C. Cir. 1980)] held Section 502(g) of ERISA to be a proper basis for awarding attorneys' fees to the trustees of fringe benefit trusts when the collective bargaining agreement in that case did not authorize recovery of attorneys' fees by either party.

II.

The Previous Decisions of This Court Do Not Permit Reopening an Unfair Labor Practice Issue in a Section 301 Suit When the NLRB General Counsel Has Finally Dismissed Charges Based on the Same Alleged Violations of Section 8(e).

The primary jurisdiction doctrine applicable to the NLRB provides the proper context for determining whether an alleged violation of Section 8(e) may be raised as a defense in a Section 301 action. At the heart of the primary jurisdiction doctrine is the congressional design for central administration of the Act by an expert agency. *Garner v. Teamsters Union*, 346 U.S. 485, 490-91, 74 S.Ct. 161, 166 (1953). Where applicable, the primary jurisdiction doctrine entirely preempts the jurisdiction of federal and state courts over conduct arguably subject to the protection or prohibition of the Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779-80 (1959).[1]

In *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267 (1962), this Court held that the express statutory exception to the primary jurisdiction doctrine provided by Section 301 creates court jurisdiction to remedy breaches of contract, even when the breach of contract is conceded to be an unfair labor practice. However, in *Motorcoach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971), this court made clear that Section 301 does not authorize litigation of the merits of unfair labor practice issues in the courts.

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[1]In this brief, as in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 199, 98 S.Ct. 1745, 1758, n. 29 (1978), the term "primary jurisdiction" refers to the *Garmon* doctrine which, where applicable, completely preempts court jurisdiction "unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act."

> "We have exempted Section 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements *even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act*. The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of the collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." (Emphasis added.) 403 U.S. at 300-01, 91 S.Ct. at 1925.

By attempting to assert its Section 8(e) defense, Northwest is attempting to litigate a dispute governed by the policies and provisions of Section 8(e), rather than "by the terms of the collective bargaining agreement itself." Permitting the courts to entertain Northwest's Section 8(e) defense would require a significant enlargement of the scope of Section 301 jurisdiction. The petition fails even to address the principle of *Smith v. Evening News*, and suggests no reason for this Court to reconsider and set aside the careful articulation of the scope of Section 301 provided by *Lockridge*.

Permitting Northwest to litigate a Section 8(e) defense in this case would be especially harmful to the NLRB's central administration of the Act, because the violations of Section 8(e) alleged by Northwest have been considered and finally dismissed for lack of merit according to the processes of the NLRB. A decision by the General Counsel of the

NLRB dismissing an unfair labor practice charge and refusing to issue a complaint is not subject to court review.

> "The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first pursuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39, 95 S.Ct. 1504, 1510-11 (1975).

As the court of appeals held, reopening the Section 8(e) issues in this Section 301 action would be inconsistent with the congressional design for central administration of the Act. (*Pet. App.*, p. 23, n. 2.) *Cf., Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979).[2]

Since the court of appeals declined to entertain Northwest's Section 8(e) defense, the court of appeals never had occasion to consider whether the dismissal of Northwest's charges by the General Counsel of the NLRB should be given a *res judicata* or collateral estoppel effect in determining the merits of a Section 8(e) defense. Therefore, Northwest's effort to create an apparent conflict among the

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[2]A party is not denied due process by a statutory design which requires that any unfair labor practice allegation be adjudicated exclusively through the processes of the NLRB. The rule is well settled that a party may not rely upon a statutorily created right and, at the same time, attack the constitutionality of other requirements and restrictions on that right contained in the same integrated statutory scheme.

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' . . . The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Fahey v. Mallonee*, 332 U.S. 245, 255, 67 S.Ct. 1552, 1557 (1947).

Northwest cannot claim a right under Section 8(e) and then complain that Congress has required that the right be pursued and adjudicated exclusively through the processes of the NLRB.

circuits regarding whether dismissal of a charge by the General Counsel should invoke the doctrines of *res judicata* or collateral estoppel is inaccurate and erroneous.[3]

III.

Northwest Has Failed to Make a Record Sufficient to Support the Section 8(e) Defense.

Even if the merits of an unfair labor practice issue could be litigated in the courts, Northwest failed to introduce evidence or make an offer of proof of facts sufficient to establish a violation of Section 8(e) of the Act. The evidentiary record is insufficient to determine the bargaining history of the disputed clause, whether the clause was for a primary work preservation purpose, designed and motivated to protect the interests of Northwest's own employees, or intended to satisfy union objectives elsewhere. *National Woodwork Manufacturer's Assn. v. NLRB*, 386 U.S. 612; 87 S.Ct. 1250 (1967). Moreover, Northwest likewise failed to offer evidence sufficient to determine whether the dis-

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[3]The cases cited in the petition to show a conflict among the circuits on this point are inapposite and unhelpful. (*Pet.*, pp. 6-7.) [*Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974) (certain findings of fact made by the General Counsel of the NLRB in dismissing a previous unfair labor practice charge were relevant to the factual issues in the duty of fair representation case before the court); *Aircraft and Engine Maintenance, etc. v. I.E. Schilling Company, Inc.*, 340 F.2d 286 (5th Cir. 1965), *cert. denied*, 382 U.S. 972 (1966) (merits of an alleged Section 8(b)(4) violation were before the court in a Section 303 damage action); *Clark Engineering and Construction Company v. Brotherhood of Carpenters*, 510 F.2d 1075 (6th Cir. 1975) (NLRB Regional Director's refusal to issue a complaint is not a defense in a Section 303 damage action); *Peltzman v. Central Gulf Lines, Inc.*, 497 F.2d 332 (2nd Cir. 1974) ("any claim that the company committed an unfair labor practice . . . would plainly be subject to the exclusive jurisdiction of the NLRB"); *Maxwell Company v. NLRB*, 414 F.2d 477 (6th Cir. 1969) (in deciding case presented by complaint, NLRB is not bound by rulings of Regional Director in declining to issue complaint in previous case between same parties); *NLRB v. Baltimore Transit company*, 140 F.2d 51 (4th Cir. 1944) (refusal to issue complaint in one case deos not estop NLRB from taking action on new complaint issued at later date upon different state of facts].

puted clause, even if intended to satisfy a secondary purpose, would properly be saved by the construction industry proviso to Section 8(e). *Id.*, 386 U.S. at 637-39, 87 S.Ct. at 1265.

In this light, Northwest is seeking this Court's attention for a theoretical issue which has no substance in the record.

In addition to being a serious flaw making this case unsuitable for review, the condition of the record on the Section 8(e) issue reconfirms the wisdom of the primary jurisdiction doctrine, by which adjudication of alleged unfair labor practices is accomplished by the NLRB after the evidentiary record is made and analyzed by the General Counsel and an administrative law judge.

IV.

In Declining to Award Attorneys' fees to Northwest, the Court of Appeals Releid on the Controlling Decision of This Court, Which Northwest Fails to Discuss.

The court of appeals relied upon *Alyeska Pipeline Service Company v. Wilderness Society, supra,* for the rule that federal courts are not authorized to base an award of attorneys' fees upon state statutes except where federal jurisdiction arises from diversity of citizenship. (*Pet. App.*, p. 24.) The court of appeals also rejected Northwest's request that a federal rule applicable to Section 301 actions be fashioned from the California statute as a matter of national labor policy. The decision of the court of appeals states:

> "We read *Alyeska,* however, as imposing strict limits on the use of state law to support attorneys' fees awards. Those limits were not overborne by the federal environmental policies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the

policies asserted by Northwest in this case." (*Pet. App.*, pp. 24-25.)

The assertion in the petition (*Pet.*, p. 9) that "the court of appeals specifically rejected state law in order to judicially create a uniform national attorneys' fees rule in Section 301 actions" is a misstatement, directly contrary to the actual decision of the court of appeals. In failing to address either *Alyeska* or the true holding of the court of appeals, the petition relies upon *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S.Ct. 1107 (1966), an inapposite decision dealing with selection of the proper statute of limitations in Section 301 actions.

V.

The Newly Enacted Statutes Cited by Northwest Provide No Support for an Award of Attorneys' Fees to Northwest.

Prior to the 1980 amendments, ERISA Section 502 did not contain a grant of federal jurisdiction for suits by trustees to recover delinquent fringe benefit contributions. 88 Stat. 891-93, 29 U.S.C. § 1132. In the types of actions originally authorized by ERISA, the court had discretion to award attorneys' fees to either party. ERISA Section 502(g), 88 Stat. 892, 29 U.S.C. §1132(g).

The 1980 amendments to ERISA added a statutory duty to pay contributions as obligated. ERISA Section 515, 29 U.S.C. § 1145. At the same time, Section 502(g) was amended, retaining the original language for actions brought under ERISA in Section 502(g)(1), 29 U.S.C. § 1132(g)(1), and adding Section 502(g)(2) relating to actions to recover delinquent contributions. In such suits for recovery of delinquent contributions, Section 502(g)(2) authorizes an award of attorneys' fees to the "plan" only — *i.e.*, to the Trustees — not to the defendant employer. 94 Stat. 1295,

29 U.S.C. § 1132(g)(D). Thus, neither the original Section 502(g) nor the amendments enacted more than two years after entry of judgment in this case authorize awarding attorneys' fees to Northwest.

Section 4301(e) of the Multiemployer Act, 29 U.S.C. §1451(e), relates solely to actions arising under Subtitle E of Title IV of ERISA (concerning statutorily created liabilities of employers who withdraw from participation in multiemployer pension plans), 29 U.S.C. §§ 1381-1453, and is inapplicable to this case.

VI.

If the Court of Appeals Had Not Erred in Construing the Master Labor Agreement, Northwest Would Not Have Prevailed on Any Issue and Could Not Claim Entitlement to Attorneys' Fees.

The only issue on which Northwest prevailed in the court of appeals involved interpretation of the MLA provisions governing use of owner-operators. The MLA requires the "contractor" (expressly defined as the employer signatory to the MLA) to make each owner-operator a *bona fide* employee and to pay the owner-operator by separate checks for wages and for equipment rental. The MLA specifically prohibits "any scheme to defeat the terms" governing owner-operators. The MLA makes no provision for the signatory employer to act as a "broker" for owner-operators. Yet the court of appeals, on *de novo* review of the MLA provisions, affirmed the district court's view that Northwest could act as a "broker" for owner-operators, receiving full compensation from whatever customer Northwest's owner-operator serves, then deducting a seven percent "brokerage commission" before transmitting the remaining compensation to the owner-operator. (*Pet. App.*, p. 21.) The district court had ruled that only the "general contractors" for

whom Northwest furnished owner-operators have the obligations under the MLA to treat the owner-operators as their *bona fide* employees. (*Pet. App.*, pp. 21-22.) Of course, the "general contractors", if signatory, could not possibly abide by the MLA by treating the owner-operators as employees, paying separate checks for wages and for equipment rental, while at the same time paying the entire compensation to Northwest for deduction of a "brokerage commission" before transmittal to the owner-operator.

Properly construed, the MLA requires Northwest to treat owner-operators as its employees and to pay related contributions to the Trustees. With a correction of this error by the court of appeals, Northwest would prevail on no issue, and would have no basis for claiming entitlement to attorneys' fees on any theory.

CONCLUSION.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: December 3, 1981.

Respectfully submitted,

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